

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR08-1459

THOMAS PRICE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered May 20, 2009

APPEAL FROM THE JEFFERSON
COUNTY CIRCUIT COURT
[NO. CR-03-469-1; CR03-1126-1;
CR04-447-1]

HONORABLE BERLIN C. JONES,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant was charged with violating the conditions of his probation for three felony offenses by violating a no-contact order, by committing domestic battery, by failing to submit monthly probation report forms, and by failing to pay fines and costs as ordered. After a hearing, the trial court found that appellant had violated the conditions of his probation and sentenced him to a prison term of sixteen years. Appellant argues on appeal that the trial court erred in admitting evidence regarding his financial status subsequent to the date of the violation report, asserting that it was a denial of due process to do so because he received no notice that his failure to pay fines and costs after the date of the violation report would be in issue. We affirm.

Defendants in revocation proceedings are not entitled to the full panoply of rights that attend a criminal prosecution. Fundamental fairness, with an opportunity to be heard, is all

that a probationer is entitled to demand. *Lockett v. State*, 271 Ark. 860, 611 S.W.2d 500 (1981). In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the United States Supreme Court held that due process requires that a probationer be afforded a revocation hearing under the same conditions held applicable to a parolee in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

The Arkansas procedures for probation–revocation hearings, set out in Arkansas Code Annotated § 5-4-310(b) (Repl. 2006), are designed to comply with the *Gagnon* decision. See *Robinson v. State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985). Subsection 5-4-310(b)(3) (Repl. 2006) requires that the defendant be given prior notice of the time and place of the revocation hearing, the purpose of the hearing, and the condition of probation he is alleged to have violated. At such a hearing, the court may permit introduction of any relevant evidence of the alleged violation, regardless of its admissibility under the rules governing admission of evidence in a criminal trial. Ark. Code Ann. § 5-4-310(b).

Here, it appears that appellant was adequately notified of the time, purpose, and subject of the hearing, and whether or not appellant paid any of his outstanding fines and costs after becoming demonstrably able to do so is not irrelevant to his intent regarding his earlier failure to pay. In any event, we could not reverse on this record because appellant has failed to demonstrate that he suffered any prejudice as the result of the admission of the disputed evidence. Appellant cites *Breeden v. State*, 270 Ark. 90, 603 S.W.2d 459 (Ark. App. 1980), for the proposition that error is presumed to be prejudicial unless it has been affirmatively shown otherwise. Although that was once the law in Arkansas, it has not been since *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985), in which

our supreme court held that prejudice would no longer be presumed and that we would no longer reverse in the absence of demonstrated prejudice.

In the present case, appellant simply alleged lack of notice and asserted that it constituted a due process violation. Significantly, he made no claim of surprise, nor did he seek a continuance or indicate the necessity of altering his defense to meet the circumstances. Those factors in themselves would support affirmance. See *Phillips v. State*, 40 Ark. App. 19, 840 S.W.2d 808 (1992). However, we note that counsel on appeal appears less than candid with this court when he asserts that “[i]t is unknown what weight was given to the testimony by the trial court,” because the trial court, in finding that appellant had violated the conditions of his probation, twice expressly stated that he was not considering the allegation of failure to pay in finding that appellant violated the terms and conditions of his probation. Under these circumstances, it cannot reasonably be argued that appellant was prejudiced by admission of evidence of his financial means subsequent to the date of his alleged failure to pay.

Affirmed

MARSHALL and HENRY, JJ., agree.